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No. 87-1938

In The Supreme Court of the United States

October Term, 1987

INTERSTATE COMMERCE COMMISSION, Petitioner,

v.

STATE OF TEXAS, ET AL., Respondents.

# OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT [CORRECTED]

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## STATEMENT OF THE CASE

This is purportedly an interlocutory appeal, taken by a federal agency *without the authorization of the Solicitor General*, from the denial of a preliminary injunction. The Fifth Circuit has already set oral argument on the very issues raised by this appeal for the week of September 5, 1988. In all likelihood, that court will have begun to write a decision on the merits before this Court rules on the instant petition. Under these circumstances alone, this petition should be denied.

However, assuming the Court wishes to further consider this matter, the State of Texas (hereinafter "Texas") submits the following statement of the case. This is done because this case presents an involved procedural history, and because Texas is extremely dissatisfied with the Interstate Commerce Commission's (hereinafter "ICC") statement of the case.

### A. Statutory Framework for Federal and State Jurisdiction

Although for jurisdictional and prudential reasons this Court should not reach the merits, it is important to note at the outset the statutory framework establishing federal and state jurisdiction over motor carrier transportation. Once this framework is understood it is readily apparent that the ICC's reliance on *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), is misplaced.

Congress has very clearly delineated the scope of the ICC's jurisdiction over transportation by a motor carrier. Under 49 U.S.C. § 10521(a)(1)(A) and (B), the

ICC has jurisdiction over motor carrier transportation that is:

> (1) between a place in -
>
> (A) A state and a place in another state;
>
> (B) A state and another place in the same state through another state;[1]

In contrast, when the commerce is on its face intrastate, Congress has, pursuant to 49 U.S.C. § 10521(b)(1), explicitly and emphatically left such regulation to the states:

> (b) This subtitle does not
>
> (1) . . . affect the power of a state to regulate intrastate transportation provided by a motor carrier.

The disputed commerce in this case takes place solely within the State of Texas and is therefore governed by 49 U.S.C. § 10521(b)(1).

B. Interplay of Proceedings Before The Interstate Commerce Commission and Judicial Trial Forums

In early 1985 the Texas Department of Public Safety initiated a motor carrier investigation of Reeves Transportation Company of Georgia (hereinafter "Reeves") pursuant to TEX. REV. CIV.

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1 *Service Storage* involved moves out of and then back into Virginia, which implicated the ICC's primary jurisdiction pursuant to this provision. See Infra at 20-22.

STAT. ANN. art. 911b (Vernon 1964 and Supp. 1988). This investigation concerned certain facially intrastate movements from the Dallas-Fort Worth area to other points in Texas. On March 25, 1985, prompted by the ongoing state investigation and *in anticipation* of a state court enforcement action, the shipper, Armstrong World Industries, Inc. (hereinafter "Armstrong"), filed a "Petition for Declaratory Order Seeking Determination of the Interstate Nature of Transportation Activities Within the State of Texas" before the ICC. The Petition sought a declaratory order, pursuant to 5 U.S.C. § 554(e), that certain commerce *within the State of Texas* was interstate in nature. The State of Texas intervened in the proceeding. No oral hearing was granted[2] and a procedure was established to allow written comments to be filed with the ICC within thirty days of the notice of the proceeding.

Thereafter, on October 3, 1985, Texas filed an enforcement action in state court pursuant to TEX. REV. CIV. STAT. ANN. art. 911b (Vernon 1964 and Supp. 1988). This action was styled *State of Texas v. E & B Carpet Mills, A Division of Armstrong World Industries, Inc. and Reeves Transportation Company of Georgia*, Cause No. 386,524 in the 353rd Judicial District Court of Travis County, Texas. Then, in light of the proceeding in state court, Texas, on or about October 4, 1985, requested in its comments filed in the ICC proceeding that the ICC defer jurisdiction to the state court action in the interest of comity.

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[2] One of the issues still pending before the Fifth Circuit in *Texas v. United States*, No. 87-4725 (hereinafter "Armstrong Petition for Review"), is whether (assuming the ICC had jurisdiction to issue the Declaratory Orders under review) an oral hearing should have been granted.

Instead, Armstrong and the ICC engaged in secret, *ex parte* correspondence concerning ways to get the case out of the state court and into a federal court.[3] In that correspondence, the ICC's General Counsel suggested to Armstrong that the ICC would intervene against Texas in a proceeding in federal court achieved by removal or by an independent action. Armstrong subsequently sought to obtain removal to federal court but was unsuccessful.

Thereafter, the ICC decision in No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order* was served on April 23, 1986 (hereinafter "*Armstrong I*"). Armstrong then attempted to use *Armstrong I* to obtain dismissal in the state court action before discovery could proceed and otherwise to thwart fact finding in that forum. However, the state district court judge allowed discovery to proceed.

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[3] Texas has obtained copies of two letters between counsel for Armstrong and the General Counsel for the ICC. Appendix A. Further evidence of these as well as other *ex parte* contacts has been obtained through a document index, (Appendix B), received pursuant to a Freedom of Information Act (hereinafter "FOIA") request, as well as in an affidavit submitted in a FOIA lawsuit in the Western District of Texas styled *Texas v. ICC*, Cause No. A-87-CA-016 (W.D. Tex. Austin Div.). Appendix C. In the FOIA action the lower court ordered the ICC to disclose six of the eleven documents Texas requested. That case is also pending in the Fifth Circuit on cross appeals by Texas and the ICC. *Texas v. Interstate Commerce Commission*, U.S.C.A. 5th Cir., No. 88-1223. A motion to consolidate that case with the appeal pending on the Armstrong Petition for Review has been denied. Oral argument in the Armstong Petition for Review has been scheduled for the week of September 5, 1988.

That discovery formed the basis of a Supplemental Petition to Reopen before the ICC.

The Supplemental Petition to Reopen alleged substantial inconsistencies between Armstrong's affidavits before the ICC and an Armstrong witness who was deposed pursuant to discovery in state court. In the meantime, while Texas was preparing this Supplemental Petition to Reopen, Armstrong and the ICC were secretly exchanging drafts of a lawsuit which Armstrong later filed in federal court in the Western District of Texas. This 42 U.S.C. § 1983 and antitrust lawsuit, styled *E & B v. Mattox*, No. A-86-CA-466 (W.D. Tex. Aus. Div.), sought *money damages* and an injunction against state officials for pursuing the state court action. The ICC sought to intervene in that lawsuit one day after it was filed.

After filing the Supplemental Petition to Reopen and learning of the federal court action, Texas moved to dismiss before the ICC on both jurisdictional grounds and grounds of bias.[4] The ICC decided the Petition to Reopen *Armstrong I* against Texas in *Armstrong II* (served August 25, 1987) even though it was aligned with Armstrong as a party in Armstrong's suit for money damages and had sued Texas pursuant to *Armstrong I* in federal district court. Not surprisingly, the ICC found in favor of Armstrong.

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[4] Both of these issues are currently pending before the Fifth Circuit in the Armstrong Petition for Review.

C Proceedings Before The Fifth Circuit

Texas filed its Petition for Review on or about October 15, 1987. Simultaneously, Texas filed a Motion to Summarily Reverse and Vacate or, in the Alternative, to Summarily Dismiss. In that motion Texas contended that *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959), did not apply and that the ICC lacked primary jurisdiction to even issue the declaratory orders under review, let alone obtain the injunction the ICC seeks from this Court. *See infra at* 16-25. This motion was denied by order dated November 19, 1987. Appendix D. However, the Fifth Circuit made no ruling on the questions presented by the motion, but rather ordered full briefing and oral argument on the jurisdictional issues raised in the motion. Oral argument is scheduled on these issues the week of September 5, 1988.

On or about November 17, 1987, the ICC moved for an injunction before the Fifth Circuit pursuant to the All Writs Act, 28 U.S.C. § 1651. In denying the injunction, the Fifth Circuit noted that the Texas appeal was basically jurisdictional with the controversy swirling around the "proper interpretation of *Service Storage & Transfer Co., Inc. v. Virginia* ... ." *Texas v. United States*, 837 F.2d 184, 185 (5th Cir. 1988). Still the court deferred ruling on the merits.

> Obviously, we intimate no opinion as to the merits of the administrative appeal or the state's likelihood of success.

*Id.* at 185 n.1.

By this Petition for Certiorari based on *Service Storage*, both the ICC and Armstrong seek to have this Court summarily resolve (ICC Petition at 10-11) the very issues for which both the ICC and Armstrong have requested and received oral argument from the Fifth Circuit. *See* ICC Brief, Armstrong Petition for Review at i, Armstrong Brief at vii. In response, this court should summarily deny the ICC's Petition for Certiorari.

## REASONS FOR DENYING WRIT

### I. This Court Lacks Jurisdiction To Review The Fifth Circuit's Decision

#### A. This Court Lacks Jurisdiction Absent Proper Representative of the Government

The ICC has confessed in a footnote in its Petition for Certiorari that the Solicitor General has not authorized the filing of the Petition. ICC Petition for Certiorari at 1-2 n.1. Pursuant to 28 U.S.C. § 518(a), "the Attorney General and the Solicitor General shall conduct and argue suits in the Supreme Court . . . in which the United States is interested." *See also* 28 C.F.R. § 0.20 (1982) (delegating to Solicitor General authority as to "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, brief and arguments, and . . . settlement thereof.") "Absent a proper representative of the Government as a petitioner . . . jurisdiction is lacking and the writ of certiorari" must be denied. *United States v.*

*Providence Journal Co.*, ____ U.S. ____, ____, 108 S. Ct. 1502, 1511, 99 L.Ed.2d 785, 801 (1988).[5]

B. This Court Lacks Jurisdiction To Decide Merits Before Judgment In the Fifth Circuit

The ICC has contended that interlocutory review is appropriate here because denial of the preliminary injunction is collateral to the proceeding still pending in the Fifth Circuit. ICC Petition at 9. For an order to be collateral *"the order must 'resolve an important issue completely separate from the merits of the action.'"* *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, ____ U.S. ____, _____, 108 S. Ct. 1133, 1137, 99 L.Ed.2d 296, 305 (1988), *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This proceeding, however, does not seek to "resolve an important issue *completely separate from the merits* of the action." Rather this proceeding seeks by interlocutory review to resolve the proper interpretation of *Service Storage*. The Fifth Circuit explicitly expressed "no opinion as to the merits" of the administrative appeal and expressly left open the proper interpretation of *Service Storage*. *Texas v. United States*, 837 F.2d at 185.

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[5] Although the ICC may have some independent authority to litigate under 28 U.S.C. §§ 2323 and 2348, such authority does not extend to suit in this Court. *See* 28 U.S.C. § 518(a). Moreover the denial of the preliminary injunction by the Fifth Circuit had no effect on the "validity" of the ICC order within the meaning of 28 U.S.C. § 2323. Only after judgment on the merits of the validity of the order is the Armstrong Petition for Review subject to review by this Court. Moreover, neither the Attorney General nor the Solicitor General has, "dispose[d] of or discontinue[d]" the Petition for Review within the meaning of 28 U.S.C. § 2348.

Moreover, this Petition concerns an application for a preliminary injunction. In such an application, this Court must consider the probability of success on the merits in determining whether to issue an injunction. Accordingly, this court must consider not only the jurisdictional issues surrounding the proper interpretation of *Service Storage*, but also all other issues currently pending before the Fifth Circuit. Before the Fifth Circuit, Texas has briefed and argued (1) that the ICC was biased; (2) that assuming the ICC has jurisdiction, it erred in not allowing an oral hearing or allowing discovery, particularly in light of factual inconsistencies and the allegations of bias; and, (3) that the ICC decision holding disputed commerce is interstate is contrary to law and precedent.[6] In effect this Court must review the entire case pending before the Fifth Circuit before a final judgment by that Court.

Although Congress expressly provided in 28 U.S.C. § 1254(1) that the Supreme Court may utilize its certiorari jurisdiction either "before or after rendition of judgment" by a court of appeals, certiorari before judgment is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). Moreover, in cases involving appeals to circuit courts from an administrative agency, exercise of this Court's jurisdiction before a judgment by the court of appeals may be tantamount to an exercise of this Court's original jurisdiction. Stern and Gressman, *Supreme Court Practice* 43-44 (6th ed. 1986). Review by this Court that "embraces

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[6] Tangentially Texas has also argued there was not substantial evidence to support the ICC's administrative decision and that it failed to place the burden on Armstrong to show that the commerce was interstate.

the whole case" as opposed to "definite and distinct questions of law" in advance of any judicial action *on the merits* "would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." *Wheeler Lumbers Bridge and Supply Co. v. United States*, 281 U.S. 572, 576 (1930); *see also Civil Aeronautics Board v. American Air Transport*, 344 U.S. 4, 5 (1952) ("This Court does not normally review orders of administrative agencies in the first instance ... ."); *United States v. Rice*, 327 U.S. 742, 747 (1946).

Here, by granting the ICC Petition for Certiorari, this Court would not only be stripping the circuit court of its proper jurisdiction to decide the merits of this controversy, but arguably exercising original jurisdiction without its proper invocation. Accordingly, the Petition should be denied.

C. This Court And Fifth Circuit Lack Jurisdiction To Order Injunctive Relief Under All Writs Act

The ICC brought an original action for an injunction to enforce the Armstrong declaratory order pursuant to 28 U.S.C. § 1651, the All Writs Act. "The All Writs Act is a residual source of authority to issue writs which are not otherwise covered by statute." *Pennsylvania Bureau of Corrections v. United States Marshalls Service*, 474 U.S. 34, 43 (1985). However, when a statute specifically addresses a particular situation, it controls rather than the All Writs Act. *See id.*

In this situtation, 28 U.S.C. § 1336(a) expressly provides that "the *district courts shall* have jurisdiction of any civil action to *enforce* in whole or in part, any order of the Interstate Commerce Commission ... ." (Emphasis added). *See also* 28 U.S.C. § 2321(b) ("The procedure in the *district courts* in actions to enforce in whole or in part *any* order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.") (emphasis added).

Here, these more specific sections control over the residual All Writs Act provision invoked by the ICC. *See Pennsylvania Bureau of Corrections*, 474 U.S. at 43. Accordingly, because Congress has expressly indicated that enforcement of an ICC order must first proceed in federal district court, this Court, like the Fifth Circuit, lacks jurisdiction to consider the injunctive relief sought. This is particularly true in the present case where the ICC has previously moved in a federal district court for the very relief requested here. In an order dated October 7, 1986, Judge Smith, in *E&B Carpet Mills v. Jim Mattox*, Civil Action No. A-86-CA-446, after considering the four requirements for a preliminary injunction, denied the identical relief sought here, holding that:

> The Court, *after examining the entire record, finds that the Plaintiff has failed to establish irreparable harm at this time and that the preliminary injunction should be denied.* While the harm to Plaintiff may be difficult to prove, the Court finds that damages could be determined.

ICC Petition, Appendix G at 48-50a (emphasis added). This court lacks jurisdiction to entertain an action seeking to attack Judge Smith's order collaterally, particularly when "[n]either Armstrong nor the ICC appealed the decision though entitled to by 28 U.S.C. § 1292(a)." *Texas v. United States*, 837 F.2d at 186.[7]

D. ICC Lacked Jurisdiction To Issue The Orders Sought To Be Enforced, Consequently This Court Has No Authority To Enforce Them

Aside from the above jurisdictional arguments, which are specific to this proceeding, Texas has contended in the Fifth Circuit that the ICC lacked jurisdiction to even issue the orders in *Armstrong I* and *II*, let alone obtain an injunction. Alternatively Texas has argued that the ICC and federal courts must abstain in deference to the ongoing action in state court and that the declaratory orders issued in *Armstrong* are advisory and not subject to review. However, before presenting those arguments (*see infra* at 16-25), which constitute the merits of the controversy in the Fifth Circuit, this Court should consider several prudential reasons for denying the writ.

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[7] The ICC has acknowledged that it has filed another motion for an injunction before Judge Smith but that he has not ruled on it. ICC Petition at 4 n.6. Rather than an original action for an injunction in the Fifth Circuit, the ICC should have sought to mandamus the district court to rule on the motion.

II. For Prudential Reasons This Court Should Deny The Writ

A. To Grant Certiorari Here Would Be An Uneconomical Use Of Judicial Resources Because It Is Unlikely This Court Could Decide Whether An Injunction Should Issue Before The Fifth Circuit Rules On the Merits

The Fifth Circuit has scheduled oral argument in the Armstrong Petition for Review the week of September 5, 1988. Given the time it will take to decide this Petition, set up a briefing schedule, calendar oral argument, and render an opinion, it is very unlikely this Court can render a ruling before the Fifth Circuit decides the merits of the Armstrong Petition for Review. Accordingly, this Court could better employ its resources than by granting certiorari.

B. Circuit Courts Should Have the Opportunity To Interpret *Service Storage*

Aside from the *Armstrong* proceeding, there are at least six (6) other cases that have either been decided by the ICC or are currently pending that involve the same fact pattern as is present here.[8]

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[8] *Matlack, Inc. -- Transportation Within Missouri -- Petition for Declaratory Order*, ICC Docket No. MC-C-10999 (hereinafter "Matlack"); *Quaker Oats Company -- Transportation Within Texas and California -- Petition for a Declaratory Order*, Docket No. MC-C-30006 (hereinafter "Quaker Oats"); *Victoria Terminal Enterprise, Inc. - Transportation of Fertilizer Within Texas - Petition for Declaratory Order*, Docket No. MC-C-30002 (hereinafter "Victoria Terminal"); *James River Corporation of Virginia- Transportation Through Woodland, California - Petition for*

Three of these cases, like the Petition for Review filed in *Armstrong*, have made their way to courts of appeal in the various circuits.[9]

None of the cases filed in the circuit courts has been decided, although all cases present the identical jurisdictional argument that is present in this case. *See infra* at 16-25. Rather than seizing jurisdiction from the Fifth Circuit to decide these issues as the ICC suggests, this Court should allow the issues to percolate in the various circuits, then see if a conflict arises.

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*Declaratory Order*, Docket No. MC-C-30044; *RAC Transport Company Inc. - Transportation of Appliances Within Colorado - Petition for Declaratory Order*, Docket No. MC-C-30052; *Bigbee Transportation, Inc. - Transportation Within Alabama, Mississippi and Georgia - Petition for Declaratory Order*, Docket No. MC-C-30065.

[9] *Matlack* is filed in the Eighth Circuit under two docket numbers: *Middlewest Motor Freight Bureau v. Interstate Commerce Commission*, No. 87-2043 and *Steere Tank Lines, Inc. v. Interstate Commerce Commission*, No. 87-2429. *Quaker Oats* is pending in the Ninth Circuit also under two dockets: *California Trucking Association, Inc. v. United States of America*, No. 87-7439 and *Steere Tank Lines, Inc. v. Interstate Commerce Commission*, No. 88-7041. *Victoria Terminal* is pending in the Fifth Circuit: *Steere Tank Lines, Inc. v. United States of America*, No. 88-4001. Copies of both the initial decisions ("*Matlack I*," "*Quaker Oats I*," *and* "*Victoria I*") and the decisions on discretionary appeal ("*Matlack II*," "*Quaker Oats II*," "and "*Victoria II*") have been lodged with the Clerk of this court.

C. The Issue of Whether An Injunction Should Issue Is Case Specific And Not Worthy Of This Court's Review

In determining the ICC's probability of success on the merits, this Court would have to review the factual allegations of bias surrounding the ICC's *ex parte* communications with Armstrong. The Court must also consider the ICC's alignment with Armstrong in the federal lawsuit against Texas officials seeking to enforce *Armstrong I* while *Armstrong II* was still pending. Under these circumstances the ICC and Armstrong lack the clean hands necessary for the equitable relief they seek. Moreover, the ICC is silent in its Petition for Certiorari as to likelihood of success on the merits regarding whether a hearing before the ICC should have been granted or whether precedent was properly applied to the facts in the ICC's determination that the disputed commerce was interstate.[10]

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[10] Similarly, the ICC's allegation of irreparable injury is contradicted by Judge Smith's order, never appealed, which found to the contrary. The ICC's attempts to psychoanalyze that opinion (ICC Petition at 4 n.6) cannot stand in light of the fact that the ICC was present at the hearing to advance its interests and the Court ruled "after examining the entire record." Moreover, the ICC is not a party to the state court proceeding and lacks standing to seek an injunction against a proceeding in which it has no stake in the outcome. Ironically, although Armstrong does have an economic interest in the state court action, Armstrong set the action for trial (Appendix E) and consequently should now be estopped from seeking to enjoin the very proceeding it sought to try.

These facts, all of which this Court must consider, belie the ICC's suggestion of a "clear cut" legal issue concerning the proper application of *Service Storage*. To the contrary, this particular case is adrift in factual claims of bias, collusion, and governmental misconduct. Should the Court desire to review *Service Storage* or its application, the Court should await a case in less troubled seas.

## III. ICC Cannot Prevail On The Merits Of The Armstrong Petition For Review

### A. ICC Lacked Jurisdiction To Issue The Armstrong Declaratory Orders

Congress has explicitly provided that the Interstate Commerce Act does not "affect the power of a state to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1). Congress alone creates the jurisdiction of federal agencies, not the agencies themselves: "An agency may not confer upon itself power." *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, ____, 106 S. Ct. 1890, 1901, 90 L.Ed.2d 369, 385 (1986). *See also Funbus Systems, Inc. v. State of California Public Utilities Commission*, 801 F.2d 1120, 1129 (9th Cir. 1986) (ICC does not "have the power to draw the boundaries of its own authority to regulate"). A statute such as 49 U.S.C. § 10521(b)(1) is a "bar to federal preemption of state regulation ... ."[11] *Louisiana Public Service Commission*, 476 U.S. at ___, 106 S. Ct. at 1904, 90 L.Ed.2d at 388.

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[11] In support of its preemption argument the ICC has relied on *Missouri Pacific Railroad Company v. Railroad Commission of Texas*, 617 F. Supp. 653 (W.D. Tex. 1987). ICC Petition at 5 n.11 That decision was substantially reversed at 833 F.2d 570 (5th Cir. 1987).

The ICC cannot use an anticipatory proceeding such as an action for declaratory relief pursuant to 5 U.S.C. § 554(e) of the Administrative Procedure Act (hereinafter "APA") as a means to expand its jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977) (APA provides no implied grant of subject matter jurisdiction); *see also Illinois Terminal Railroad Co. v. ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982) (APA provides no implied grant of subject matter jurisdiction, so some other underlying authority for issuance of declaratory order must exist).

Historically, state courts, not the ICC, have had primary jurisdiction to determine the issues at stake here:

> *It is the state courts which have the first and the last word* as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. *We have disapproved anticipatory declarations* as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected.

*Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952) (emphasis added); *see also United States v. Idaho*, 298 U.S. 105, 109 (1936) (question as to interstate nature of railroad track should be decided by courts, not governmental agencies).

Moreover, it has long been well established that "*[f]ederal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law.*" *Public Service Commission v. Wycoff*, 344 U.S. at 248 (emphasis added); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, ____, 106 S. Ct. 3229, 3232, 92 L.Ed.2d 650, 658 (1986) ("A *defense* that raises a federal question is inadequate to confer federal jurisdiction.") (emphasis added); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983) ("since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.");[12] *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 672 (1950); *Beers v. North American Van Lines Inc.*, 836 F.2d 910, 913 (5th Cir. 1988) (Fifth Circuit, *sua sponte*, dismissed appeal of an action

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[12] Here, Armstrong, contending that the commerce at question was interstate, carried its defense directly to the ICC rather than raising such defense in the context of a state court enforcement action. In effect Armstrong sought removal in two steps. *First*, file a Petition for Declaratory Order before the ICC. *Second*, after an ICC decision, force Texas to file for review. The fact that Armstrong seeks removal via a Petition for Declaratory Order pursuant to 5 U.S.C. § 554(e) and review of that order by a federal court cannot establish federal question jurisdiction if it is otherwise lacking. *See Califano v. Sanders*, 430 U.S. at 107 (APA provides no implied grant of subject matter jurisdiction).

which had been removed to federal court based on preemption defense under Interstate Commerce Act); *Greenfield & Montague Transportation Area v Donovan*, 758 F.2d 22, 26 (1st Cir. 1985) (plaintiffs may not use federal law to engage in preemptive strike against state court jurisdiction).[13]

These arguments are particularly compelling in the instant case because, here, a state court has already determined that the subject commerce is intrastate and issued an order enjoining the disputed movements. *See* ICC Petition, Appendix H, 51-53a. It is a well settled principle that federal appellate review of state court judgments can only occur in the Supreme Court on appeal or by Writ of Certiorari. *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). The Fifth Circuit already recognized these principles in *Texas v. United States*, 837 F.2d 184, 186 (5th Cir. 1988): "[T]he state court's application of the ICC's order could be reviewed in due course by the United States Supreme Court."

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[13] In another context the ICC has openly acknowledged these important jurisdictional and federalism issues in refusing to entertain a proceeding to establish rules as to what constitutes interstate or intrastate commerce: "Insofar as Petitioner urges us to take jurisdiction as a convenient and expeditious means of defeating State efforts to assume jurisdiction, we cannot do so." *United States Department of Transportation -- Petition for Rulemaking -- Single State Transportation in Interstate or Foreign Commerce, Ex Parte* No. MC-182, slip op. at 6 (hereinafter "DOT") served on January 28, 1987. That reasoning under the authority cited above, applies as well to individual adjudications. A copy of the DOT slip opinion has been lodged with the Clerk of this Court.

B. *Service Storage* Does Not Apply Where Commerce Is Facially Intrastate

Nothing in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959) changes this analysis. In *Service Storage*, the Virginia State Corporation Commission brought an enforcement action against a company which routed goods from Virginia through a "gateway" terminal in West Virginia and back into Virginia. Virginia contended that those interstate shipments were "a mere subterfuge to escape intrastate regulation and evade its jurisdiction." *Id.* at 175.

Prior to any decision by the Virginia State Corporation Commission, Service Storage petitioned the ICC for a declaratory order interpreting its certificate. Thereafter, Virginia's Commission decided that Service Storage was operating intrastate and fined them for operating without intrastate authority. Subsequently, the ICC issued its opinion construing Service Storage's certificate as authorizing the interstate routing.

In a narrow opinion decided only "*under the facts here*," this Court ruled that the "interpretation of petitioner's interstate commerce certificate should first be litigated before the Interstate Commerce Commission ... ." *Id.* at 173. This Court further circumscribed its ruling with a telling rationale directed at the possibility of multiplicitous litigation:

> Thus the possibility of a multitude of interpretations of the same federal certificate *by several States* will be avoided and a uniform administration of the Act achieved.

*Id.* at 179 (emphasis added).

Here the facts are very different from the situation in *Service Storage*. First and most significant, the shipments in *Armstrong* are on their face *intrastate*. This is unlike *Service Storage* where Virginia never contested the fact that the shipments moved interstate. Rather, Virginia maintained such interstate movements were a subterfuge to evade its jurisdiction.[14] Further, there is no concern here, as was the case in *Service Storage*, of a possible "multitude of interpretations of the same federal certificate by *several* States"[15] since the subject

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[14] Necessarily, under § 10521(a)(1), when movements are involved which are on their face interstate, the ICC has jurisdiction to decide whether the routing between the states is a subterfuge. Conversely, under §10521(b)(1), when the subject commerce is facially intrastate, the state, not the ICC, has jurisdiction to decide the nature of that commerce. Any other interpretation of the concurrent jurisdictional scheme over motor carriers set out in § 10521 would fail to give effect to all of its provisions.

[15] The ICC has also relied on *Jones Motor Co. v. Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959) and *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954). *Jones* involved a situation, like *Service Storage*, where the questioned traffic was across state lines and the state commission, not the ICC, had erroneously declared this traffic a subterfuge. *See Jones Motor Company v. Pennsylvania Public Utility Commission*, 149 A.2d 491 (Pa. Super. Ct. 1959). Similarly, *Castle* applied only to ICC jurisdiction over interstate commerce across state lines because the Court had earlier dismissed an appeal of Hayes' suspension from intrastate operations for want of a substantial federal question. *See Castle*, 348 U.S. at 63 n.5.

Here, unlike *Jones*, *Castle*, and *Service Storage*, the subject commerce moves solely within Texas. *Compare Jones* (subject commence interstate: Pennsylvania - New Jersey - Pennsylvania) and *Castle* (subject commerce interstate:

commerce is solely within Texas. Moreover, Texas does not seek any interpretation of Reeves' interstate certificate. In fact, whether Reeves possesses an ICC certificate is irrelevant to the state enforcement action, which seeks only to enjoin intrastate violations of a Texas statute.[16]

C. Even Assuming The ICC Had Jurisdiction, Under *Younger-Burford* Analysis The ICC Or This Court Should Decline To Exercise It

In refusing to enjoin the state court enforcement action, the Fifth Circuit, citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), reasoned "we are guided by the overarching principle that federal courts are to be cautious about infringing on the legitimate exercise of state judicial power." *Texas v. United States*, 837 F.2d at 186. Given 49 U.S.C. § 10521(b)(1), the court noted that "the ICC points to no authority indicating that Congress has tipped the

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(Illinois - Seven other states - Illinois) *and Service Storage* (subject commerce interstate: Virginia - West Virginia - Virginia) *with Armstrong* (subject commerce intrastate: Texas - Texas).

16 "The mere possession of an ICC certificate cannot convert ... intrastate activities into violations of federal law." *Schenck Transportation, Inc. v. Inter-County Motor Coach, Inc.*, 350 F.Supp. 306, 309 (E.D.N.Y. 1972). Nor can an ICC certificate "provide a bootstrap for finding federal ... court jurisdiction ... ." *Id.* The sole issue here is whether certain motor carrier traffic within a single state is interstate or intrastate and who has jurisdiction to decide. The ICC specifically acknowledged this in *Armstrong I*: "All parties agree that the issue presented here is whether the movements of non-sidemarked carpet from Arlington to other Texas points are interstate or intrastate in nature." *Armstrong I*, slip op. at 2; ICC Petition at Appendix E at 14a.

balance in favor of federal interests." *Id.* at 187. *Accord Louisiana Public Service Commission*, 476 U.S. at _____, 106 S. Ct. at 1901, 90 L.Ed.2d at 385 (provisions such as 49 U.S.C. § 10521(b)(1) constitute an express congressional denial of power to agency); *see also New Orleans Public Service, Inc. v. City of New Orleans*, 798 F.2d 858, 860 (5th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 1910, 95 L.Ed.2d 515 (1987) (where Congress creates a "bright line" between federal and state jurisdiction, "federal court intervention ... may constitute a disruption of a state regulatory scheme" in an area of regulation which "is clearly a field left to the state."); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).[17]

Moreover, abstention is especially appropriate where the federal adjudication is advisory:

> In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.

*Pennzoil v. Texaco*, ____ U.S. ____, 107 S. Ct. 1519, 1526 n.9, 95 L.Ed.2d 1, 16 n.9 (1987); *see also Railroad Commission of Texas v. Pullman Co.*, 312 U.S.

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[17] The injunction is also barred by the Anti-Injunction Act, 28 U.S.C. § 2283. *See Chick Kam Choo v. Exxon Corp.*, ___ U.S. ___, ___, 108 S. Ct. 1684, 1691, ___ L.Ed.2d ___, ___ (1988) ("We simply hold that respondents must present their pre-emption argument to Texas state courts, which are presumed competent to resolve federal issues.")

496 (1941). Here, even the ICC has emphatically recognized the orders are advisory.

Most recently in a declaratory order proceeding identical in type to the instant case the ICC noted, in what has become almost boilerplate in these type cases, that:

> *This is a declaratory order proceeding, not an adversary proceeding.* There is no need of oral hearing in this case because the purpose of a declaratory order is simply to remove uncertainty as to the legal effect of the fact pattern presented by the party requesting the declaration. *It is not a verification of those "facts," nor does it apply to any different circumstances (which may or may not differ materially for purposes of the legal analysis involved).* This proceeding involves neither an application nor a complaint, and *it makes no final determination as to any specific rights of any party.* Our decision is simply our interpretation of the applicable law as it applies to a given set of facts.

*Victoria II*, slip op. at 1-2 (emphasis added); *see also Quaker Oats II*, slip op. at 1;[18] *Matlack I*, slip op. at 1 and *Matlack II*, slip op. at 3-4. Moreover, although not using identical language, the ICC in *Armstrong II* noted it was not deciding specific factual and legal controversies as to "whether every individual shipment has moved lawfully in Interstate Commerce ... ." *Armstrong II*, slip op at 8; ICC

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[18] *See also Ouaker Oats I*, slip op. at 2, fn. 4.

Petition, Appendix F at 45-46a. Rather, the ICC admitted its interpretation was purely abstract, dealing with "the nature and concept of disputed commerce as a whole ... ." *Id.*

Given this persistent and consistent message from the agency itself, it cannot be seriously disputed that declaratory orders, such as those issued herein, are nonfinal and not subject to review. *Port of Boston Marine Terminal Association v. Rederiaktiebolajet Transatlantic*, 400 U.S. 62, 71 (1970); *United States v. Los Angeles and S.L.R.*, 273 U.S. 299, 310 (1927) (ICC Order "does not determine any right or obligation" and "is merely the formal record of conclusions reached after a study of data ... ."). *See also Texas v. United States*, 837 F.2d at 186 (refusing to enforce ICC orders at issue here and holding them subject to state court "interpretation"); *City of Miami v. ICC*, 669 F.2d 219, 221-222 (5th Cir. 1982).

## CONCLUSION

Wherefore, for the aforesaid reasons, Texas requests the Petition for Certiorari be denied.

Respectfully submitted,

**JIM MATTOX**
Attorney General of Texas

**MARY F. KELLER**
First Assistant Attorney General

**ANNE E. SWENSON**
Assistant Attorney General

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* Counsel of Record

July, 1988

## APPENDIX A

October 25, 1985

Robert S. Burk, Esquire
General Counsel
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Room 5211
Washington, DC 20423

Re: *The State of Texas v. E&B Carpet Mills, A Division of Armstrong World Industries, Inc., and Reeves Transportation Company of Georgia*
Travis County, Texas, District Court
Case No. 386524

Dear Mr. Burk:

E&B Carpet Mills, a division of Armstrong World Industries, Inc. (E&B), as here pertinent manufactures carpet at or near Dalton, Ga., and ships carpet from its mill and warehouse facilities at Dalton, Ga., to its Arlington, Tex., service center. From Arlington, shipments are made to customers in Texas as well as to customers in other southwestern states. It is E&B's fixed and persisting intent that the shipments remain in interstate commerce until delivery to the ultimate customers. The shipments from the Arlington warehouse to points in Texas that move by Reeves Transportation Company of Georgia (Reeves) have freight charges prepaid by E&B. Other carriers, secured by the consignees, also pick up and deliver shipments from Arlington to points in Texas.

A controversy has arisen concerning whether the shipments form Arlington to points in Texas which are transported by Reeves under the Armstrong prepaid freight program are shipments in interstate or intrastate commerce. In an attempt to resolve the problem, and to obtain guidance for future shipments, a petition for declaratory order was filed by E&B in Docket No. MC-C-10963. A proceeding was in fact instituted, and the deadline for filing of initial comments was October 7, 1985. Numerous parties, included the Texas Railroad Commission and the Attorney General of Texas, as well as certain Texas intrastate carriers, participated in the filing of comments in those proceeding. However, on October 3, 1985, the Attorney General filed the referenced court case in the District Court of Travis County, Texas, seeking a preliminary and permanent injunction, as well as money damages, in an attempt to halt transportation by Reeves from the Arlington service center to points in Texas. Reeves holds no Texas intrastate authority. Reeves doe hold proper authority from the Interstate Commerce Commission in Docket No. MC-129537, Sub No. 68. A more complete statement of the facts is contained in the E&B comments filed on October 7, 1985, copy attached.

An informal understanding had been reached with an Assistant Attorney General of Texas that no action

would be taken in state court until the Interstate Commerce Commission declaratory order proceeding was concluded, if at all. However, it appears that the Texas Railroad Commission has agitated for action by the Attorney General, and that is what has given rise to the suit.

On behalf of E&B, we are attempting to remove the referenced case to federal district court in Austin, Tex. However, because the complaint is worded so as not directly to mention any federal issue, and because the State of Texas is not a citizen for purposes of diversity, it is not certain that our removal effort will succeed, even though we have found one similar case in which removal was permitted and upheld on appeal. *Blease, et al. v. Safety Transit Co.*, 50 F.2d 852 (4th Circuit, 1931). Should removal be successful, then we of course expect to request the federal district court in Austin to refer the matter to the Interstate Commerce Commission on the issue of whether or not interstate commerce is involved, and that the court will honor the request.

Our apprehension, of course, is that under the present procedural posture, the federal district court may remand the case to the Texas District Court. Should this occur, then we feel it would be highly desirable for the Interstate Commerce Commission to intervene in the Texas District Court, as a third party

plaintiff in order to assert its right to regulate interstate commerce involving movements within Texas. Then, with a federal issue apparent on the face of the commission's pleading, we could again move for removal with some reasonable likelihood of success.

The situation involved here is a very thorny one, and one which I have encountered numerous times during the last 20 years of practice in the area of transportation law. Drawing a line between what constitutes interstate commerce and intrastate commerce is troublesome at best. It was in view of this situation that E&B has, in its comments, requested the Commission to establish a "safe harbor" rule that would greatly assist in establishing the dividing line. Unfortunately, action taken by the State of Texas now may serve merely to obfuscate matters, at least in the near term. Appropriate action on your part, after instruction and authorization by the Interstate Commerce Commission, would help to assure that this matter will be concluded in an orderly fashion and with a minimum amount of litigation.

Service of the plaintiff's original petition, a copy of which is attached, occurred on October 17, 1985. It is my understanding, although I am not a member of the Texas Bar, that E&B has 20 days within which to answer. Therefore, time is of the essence in

obtaining Interstate Commerce Commission action. Your early response would be appreciated.

With kindest personal regards, I remain,

Very truly yours,

*/s/ W. P. Jackson, Jr.*
William P. Jackson, Jr.

WPJ/smw
Enclosures
cc: Jerome C. Finefrock, Esquire

October 31, 1985

Mr. William P. Jackson, Jr.
Jackson & Jessup
P.O. Box 1240
Arlington, VA 22210

Re: *State of Texas v. E&B Carpet Mills, et al.*,
Trans [sic] County (Tex.) Judicial District Court,
No. 386524

Docket No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order*

Dear Mr. Jackson:

In your letter of October 25, 1985, you requested our views on the possibility of ICC intervention in the above-referenced state court proceeding. The state court action arises out of a complaint by the Texas Attorney General seeking to enjoin a motor carrier from providing what is alleged to be intrastate transportation without holding state-issued operating authority. The carrier contends, however, that the movements are interstate in nature and are therefore authorized by its ICC-issued certificate. (Whether the ICC certificate actually authorizes the operations is now before the Commission in the above-referenced declaratory order proceeding.)

In general, the Commission has taken a firm position in support of its exclusive jurisdiction to

make the initial interpretation of a federal motor-carrier certificate, as established in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959) and *Jones Motor Co. v. Penn. PUC*, 361 U.S. 11 (1959). For example, my staff has already provided you with copies of our briefs in the recent *Funbus* litigation, where the California PUC has attempted to enjoin a federally certificated carrier's operation in a state administrative proceeding. The ICC intervened there once the ICC-certificated carrier had succeeded (at least temporarily) in having the case presented in a federal rather than state forum.

In the present case, although the ICC's interpretive jurisdiction seems equally clear and has been invoked via the declaratory order proceeding, we are reluctant to recommend that the Commission should become involved in a controversy that is still in a state forum. If the case were already presented in a federal court either via removal or a separate federal complaint for injunctive relief, as in *Funbus*, the situation would be quite different. As it is, we believe it to be in the Commission's interest to fight this battle, if at all, in a federal forum. Accordingly, we do not plan to make any recommendation regarding ICC intervention in the state court proceeding. We hope, however, that you will keep us apprised of any further developments. If the case

reaches a federal court, we will be glad to discuss the Commission's interest in possible direct participation at that point.

Sincerely,

*/s/ Robert S. Burk*
Robert S. Burk
General Counsel

# APPENDIX B

## DOCUMENT INDEX

Documents Withheld:

1. General Counsel Memorandum 11/25/85, To Chairman Taylor, No. 85-287, Re: Docket No. MC-C-10963.

2. Letter from General Counsel to William P. Jackson 11/25/85, Re: Commission vote for ICC appearance in non-enforcement judicial proceedings.

3. Letter from William P. Jackson to General Counsel 11/12/85, Re: Request for ICC appearance in *Texas v. E&B Carpet Mills.*

4. Memorandum to Director Mackall from General Counsel 3/14/86, No. 86-52, Re: Modification to prior G.C. Memorandum No. 85-287.

5. Draft Decision for No. MC-C-10963, 2/_/86.

6. Draft Decision for No. MC-C-10963, 3/20/86.

7. Draft Memorandum of Law 9/5/86, re: *E & B Carpet Mills and ICC v. Jim Mattox, et al.*

8. General Counsel Memorandum 8/1/86, Re: 5th Circuit granting motion to dismiss petition as premature.

9. Letter from R. James George to Glenn Scammel 8/8/86, and attached draft of complaint.

10. Letter from R. James George to Glenn Scammel 8/13/86, and attached draft of complaint.

11. Draft of Complaint from W.P. Jackson.

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| STATE OF TEXAS,<br>Plaintiff, | ) | |
| v. | ) | Civil Action No. A-87-CA-016 |
| INTERSTATE COMMERCE COMMISSION<br>Defendant. | ) | |

## AFFIDAVIT OF INTERSTATE COMMERCE COMMISSION FREEDOM OF INFORMATION/PRIVACY OFFICER S. ARNOLD SMITH

I, S. Arnold Smith, being duly sworn, depose and state:

I am an attorney employed by the Interstate Commerce Commission as its Freedom of Information/Privacy Officer. I have served in this position since February 1, 1979. Pursuant to Commission regulation (49 C.F.R. 1001.4), I am responsible for initially deciding whether documents requested under the Freedom of Information Act will be made available. The statements made in this affidavit are based on my person knowledge and upon information available to me in my official

capacity, and are true and accurate to the best of my knowledge and belief.

By letter dated October 13, 1986 (Plaintiff's Ex. A), Mr. Robert Ozer, a Texas Assistant Attorney General, Energy Division, requested, inter alia, certain documents relating to an ongoing Commission proceeding, Docket No. MC-C-10963, *Armstrong World Industries, Inc. - Transportation Within Texas - Petition for Declaratory Order (Armstrong)*, and federal court litigation in *E&B Carpet Mills v. Mattox*, No. A-86-CA-446 (W.D. Tex.) (*E&B Carpet Mills*). After a search of the agency's records, I responded to Mr. Ozer's request by releasing some documents, but withholding 11 others pursuant to 5 U.S.C. 552(b)(5) (the executive and attorney work-product privileges incorporated under that section).

In order to understand the basis for may [sic] determinations a short discussion of the *Armstrong* and *E&B Carpet Mills* proceedings is in order. The *Armstrong* proceeding was initiated before the Interstate Commerce Commission by Armstrong World Industries, Inc. (which has a division, E&B Carpet Mills, that manufactures carpet) and Reeves Transportation Company of Georgia, a federally licensed interstate common carrier, to determine whether Reeves' movements of "non-sidemarked" carpet from Arlington to other Texas points were interstate or intrastate in nature. The State of Texas filed comments in the proceeding. By decision served April 23, 1986, the Commission found that

the incidents surrounding the involved transportation established that the movements of non-sidemarked carpet within Texas by Reeves were interstate in nature, lawfully performed under a storage-in-transit provision contained in an appropriate tariff. The State of Texas filed a petition to reopen that decision that is presently pending before the agency.

*E&B Carpet Mills* is a proceeding presently pending in the United States District Court for the Western District of Texas, Austin Division. There, the plaintiffs, Reeves and E&B, seek injunctive relief from the federal court to prevent the state defendants from pursuing litigation in state court against Reeves and E&B for activities conducted under color of Reeves' federal motor carrier certificate.[1] The Interstate Commerce Commission has moved to intervene in support of E&B and Reeves' motion. The Commission seeks to participate to assert its interest in, and preserve its exclusive original jurisdiction over, the interpretation of the scope of Reeves' federal interstate operating authority and the related tariffs reflecting Reeves'

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[1] The state defendants are the Attorney General of the State of Texas and certain members of his staff. In October 1985, while the *Armstrong* proceeding was pending before the Commission, these defendants filed on behalf of the State of Texas a suit against Reeves (and its principal shipper, E&B) for injunctive relief and penalties under state law for allegedly "unauthorized" Reeves operations in Texas. *State of Texas v. E&B Carpet Mills, et al*, 353d Judicial District Court, Travis County, Texas, No. 386,524.

interstate service. By order signed October 7, 1986, United States District Judge Walter S. Smith, Jr. denied E&B's motion for a preliminary injunction because there was no showing of irreparable harm. E&B subsequently filed a renewed motion for preliminary injunction that is presently pending before the Court.

The documents withheld and the reasons why they were withheld are connected with the proceedings described above. I will now describe with particularity the documents and exemptions claimed.

1. Description: This is a six-page memorandum dated November 25, 1985, from ICC General Counsel Burk to ICC Chairman Taylor. It provided the Chairman with legal analysis of the Commission's primary jurisdiction to interpret the bounds of certificates that it issues. It further discussed the impact of state court action by Texas on that jurisdiction and possible intervention in a federal action to protect the agency's primary jurisdiction to interpret Reeves' federal motor carrier certificates in the pending declaratory proceedings (*Armstrong*).

   Exemption: This memorandum was withheld under the executive process and attorney work-product privileges. The memorandum is a deliberative and confidential intra-agency

memorandum containing legal analysis and recommendations from the agency's General Counsel to the Chairman. The document is also attorney work-product because it was prepared by agency attorneys in anticipation of the litigation in *E&B Carpet Mills*.

2. Description: This is a letter, dated November 25, 1985, from ICC General Counsel Burk to William F. Jackson, Jr., counsel for E&B and Reeves, regarding a Commission vote for ICC appearance in non-enforcement judicial proceedings.

Exemption: This letter was withheld pursuant to the attorney work-product privilege. It was prepared by Commission counsel in contemplation of the litigation in *E&B Carpet Mills* and discusses strategy related to the litigation.

3. Description: This is a letter, dated November 12, 1985, from William P. Jackson, Jr., counsel for E&B and Reeves, to ICC General Counsel Burk, requesting Commission participation in litigation to assert the agency's primary jurisdiction.

Exemption: This letter was withheld pursuant to the attorney work-product privilege.

Although it was prepared by counsel not employed by the agency, the Commission intervened in the subsequent federal court action supporting E&B and Reeves' claim that the Commission has primary jurisdiction to determine the matter. This and other shared communications regarding trial strategy between co-counsel on the same side of the primary jurisdiction litigation remain privileged.

4. Description: This is a two-page memorandum, dated March 14, 1986, from ICC General Counsel Burk to Director Mackall containing commentary on the legal defensibility of the draft decision in *Armstrong*.

Exemption: This memorandum was withheld under the executive and attorney work-product privileges. The document is an intra-agency memorandum between agency staff with respect to a draft decision in *Armstrong*. The memorandum is further protected as attorney work-product because it was prepared in anticipation of litigation when the Commission's decision is reviewed on appeal. Indeed, an attempt has already been made to obtain judicial review of the agency's April 23, 1986 *Armstrong* decision. *Texas v. United States*, No. 86-4430 (5th Cir. July 25, 1986)

(dismissing as premature the Texas petition for review of *Armstrong* without prejudice to refiling after the Commission has acted on pending motions for reconsideration).

5. Description: This is a 13-page draft decision in *Armstrong* circulated between Commission staff in February, 1986.

   Exemption: This document was withheld pursuant to the executive privilege. It is a predecisional working draft decision in the *Armstrong* case.

6. Description: This is a 13-page draft decision in *Armstrong* and one-page memorandum to the Commission, dated March 20, 1986.

   Exemption: As with document 5 above, this document was withheld pursuant to the executive privilege. The document is a predecisional working draft decision in the *Armstrong* case circulated between agency staff.

7. Description: This is a 17-page draft memorandum of law dated 9/5/86 prepared by counsel for E&B for the *E&B Carpet Mills* litigation.

Exemption: This document was withheld pursuant to the attorney work-product privilege. It was prepared by counsel for E&B and contains their strategy and theories in the *E&B* case. It was shared with Commission counsel because they intervened to support E&B's request for an injunction (on the basis ot [sic] the Commission's primary and exclusive jurisdiction to interpret the scope of interstate motor carrier certificates it issues).

8. Description: This is a one page memorandum dated August 1, 1986, from Acting ICC General Counsel Rush to the Commission discussing the decision in *State of Texas v. United States*, No. 86-4430 (5th Cir. July 25, 2986 [sic]).

Exemption: This document was withheld under the executive and the attorney work-product privileges. It is protected under the former privilege because it is on intra-agency memorandum, discussing the impact of this decision on the pending agency proceedings (*Armstrong*). It is attorney work product because it contains counsel's analysis and was prepared in connection with litigation in the Fifth Circuit that the agency anticipates may continue.

9. Description: This is a letter dated August 6, 1986, from R. James George, Jr., counsel for E&B, to Glenn Scammel, at the time an attorney in the ICC General Counsel's Office, regarding a proposed complaint in *E&B Carpet Mills*. Attached to it is a nine-page draft complaint for the E&B litigation.

Exemption: This document was withheld pursuant to the attorney work-product privilege. The document contains counsel's litigation strategy and theories. It was prepared by E&B's attorneys in anticipation of the E&B litigation and was shared with Commission counsel who have filed in support of E&B's complaint in United States District Court (in order to protect the agency's jurisdiction to decide the merits of the *Armstrong* declaratory order proceeding before the Commission).

10. Description: This is a letter dated August 13, 1986, from R. James George, Jr., counsel for E&B, to Glenn Scammel, at the time an attorney in the ICC General Counsel's Office, regarding a proposed complaint in *E&B Carpet Mills*. Attached to it is an 11--page draft complaint for the E&B litigation.

Exemption: Same as Number 9, above.

11. Description: This is a 12-page draft complaint from William P. Jackson, Jr., counsel for E&B, for the E&B case.

Exemption: Same as Number 9, above.

The above-described documents were withheld pursuant to the (b)(5) exemption, which incorporates the executive and/or attorney work-product privileges. Release of documents 1, 2, 3, 4, 7, 8, 9, 10, and 11 would result in the disclosure of attorneys' mental impressions, conclusions, legal theories, or strategies regarding specific litigation. Documents 2, 3, 7, 9, 10 and 11 are communications with counsel who are on the same side in the E&B litigation where the Commission has intervened on E&B's side. These documents relate exclusively to the efforts of the parties to protect (through litigation) the agency's primary jurisdiction to decide the merits of the *Armstrong* case, and are not addressed to the substantive issue in *Armstrong* of whether the underlying transportation should have been found to be interstate (as opposed to intrastate) in nature. Documents 1, 4, 5, 6 and 8 are intra-agency memoranda, release of which would interfere with future open intra-agency discussion and could cause potential confusion.

In sum, I believe that release of the documents in question would have been inappropriate at the

time, and continues to be so now in light of pending administrative and judicial proceedings.

Respectfully submitted,

*/s/ S. Arnold Smith*
S. ARNOLD SMITH
FOI/Privacy Officer
Interstate Commerce
Commission

NOTARY

Subscribed and sworn before me this 20th day of February, 1987.

*/s/*_____

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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87-4725

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STATE OF TEXAS,
Petitioner,

versus

UNITED STATES OF AMERICA,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

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Petition for Review of an Order of the
Interstate Commerce Commission

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Before POLITZ, JOHNSON and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of the Quaker Oats Company, et al., intervenors in cause number 87-4702 for leave to late file their reply to the motion of the State of Texas to consolidate proceedings in cause number 87-4702 for leave to late file their reply to the motion of the State of

Texas to consolidate proceedings in cause number 87-4725 is GRANTED.

IT IS FURTHER ORDERED that petitioner's motion to consolidate the reference cause with cause number 87-4702 *Steere Tank Lines, Inc. v. ICC & U.S.A.*, is DENIED.

IT IS FURTHER ORDERED that the motion of Central Freight Lines Inc., for leave to intervene in support of petitioner is GRANTED.

IT IS FURTHER ORDERED that the motions of petitioner and intervenor Central Freight Lines Inc., to summarily reverse and vacate the Agency's decision are DENIED. However, the court makes no ruling on the questions presented by the motion. Rather, the court is persuaded that it will benefit from full briefing and oral argument of the case.

IT IS FURTHER ORDERED that the alternative motion of petitioner and intervenor for summary dismissal is DENIED.

## APPENDIX E

GRAVES, DOUGHERTY, HEARON & MOODY
2300 INTERFIRST TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600
**(PORTIONS OF LETTERHEAD OMITTED)**
May 21, 1987

Mr. John Dickson
District Clerk
Travis County Courthouse
Austin, Texas 78701

Re: No. 386,524 - The State of Texas v. E & B Carpet Mills, a Division of Armstrong World Industries, Inc., et al

Dear John:

Enclosed you will find our check for $5.00 for the jury fee provided by Rule 216, Texas Rules of Civil Procedure. By this letter, we are requesting that the above-styled and numbered cause be set for jury trial on Monday, December 7, 1987, at 9:00 a.m.

Yours sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
BY /s/ R. James George, Jr.
R. James George, Jr.

RJGjr/th
Enclosure

cc: Mr. Robert Patterson
Court Coordinator
Mr. Norberto Flores
Mr. James M. Doherty
Mr. Timothy J. Herman
Mr. Mert Starnes
Mr. Jerry Prestridge
Mr. William P. Jackson, Jr.
Mr. Jerome C. Finefrock
(w/o encl.